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SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
A Limited Liability Partnership
Including Professional Corporations
TENAYA RODEWALD, Cal. Bar No. 248563
JAMES M. CHADWICK, Cal. Bar No. 157114
CRISTINA SALVATO, Cal. Bar. No. 295898
379 Lytton Avenue
Palo Alto, California 94301-1479
Telephone: 650.815.2600
Facsimile: 650.815.2601
E mail trodewald@sheppardmullin.com
jchadwick@sheppardmullin.com
csalvato@sheppardmullin.com

Attorneys for FIRST AMENDMENT COALITION, LOS ANGELES TIMES COMMUNICATIONS LLC, CALIFORNIA NEWSPAPERS PARTNERSHIP L.P., THE CENTER FOR INVESTIGATIVE REPORTING, and CALIFORNIA NEWS PUBLISHERS ASSOCIATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

LOS ANGELES POLICE PROTECTIVE LEAGUE,

Petitioner,

v.

CITY OF LOS ANGELES, a municipal corporation, MICHAEL R. MOORE, Chief of Police for the City of Los Angeles, and DOES 1 through 20, inclusive,

Respondents.

FIRST AMENDMENT COALITION, a California non-profit, public benefit corporation; LOS ANGELES TIMES COMMUNICATIONS LLC, a Delaware limited liability company; CALIFORNIA NEWSPAPERS PARTNERSHIP L.P., a Delaware limited partnership; THE CENTER FOR INVESTIGATIVE REPORTING, California non-profit, public benefit corporation; and CALIFORNIA NEWS PUBLISHERS ASSOCIATION, an association of California news organizations,

Intervenors.

Case No. 18STCP03495

MEDIA INTERVENORS' EXCEPTION TO PETITIONER'S OPPOSITION TO MEDIA INTERVENORS' CCP 170.6 PEREMPTORY CHALLENGE, OR IN THE ALTERNATIVE, REPLY TO PETITIONER'S OPPOSITION

Dept.: 85

[Petition Filed: December 31, 2018]

Intervenors First Amendment Coalition ("FAC"), Los Angeles Times Communications LLC ("LAT"), California Newspapers Partnership L.P. (doing business as the Southern California Newspaper Group or SCNG ("SCNG") and Bay Area News Group ("BANG")), The Center for Investigative Reporting, Inc. ("CIR"), and California News Publishers Association ("CNPA") (collectively, "Media Intervenors") submit this Exception to Petitioner Los Angeles Police Protective League's ("LAPPL") Opposition to Media Intervenor's CCP 170.6 Peremptory Challenge, or in the alternative Reply to Petitioner's Opposition.

I. LAPPL'S "OPPOSITION" IS IMPROPER AND THE COURT SHOULD DISREGARD IT

"'[B]y enacting section 170.6, the Legislature guaranteed litigants the right to ***automatically*** disqualify a judge based solely on a good faith belief in prejudice; proof of actual prejudice is not required.'" *Swift v. Superior Court*, 172 Cal.App.4th 878, 882 (2009) (emphasis added). Code of Civil Procedure 170.6(4) provides: "If the [peremptory challenge] motion is duly presented, and the affidavit or declaration under penalty of perjury is duly filed or an oral statement under oath is duly made***, thereupon and without any further act or proof***, the judge supervising the master calendar, if any, shall assign some other judge, court commissioner, or referee to try the cause or hear the matter." Code Civ Proc § 170.6(4) (emphasis added). "Where a disqualification motion is timely filed and in proper form, the trial court is bound to accept it without further inquiry." *Barrett v. Superior Court*, 77 Cal.App.4th 1, 4 (1999). "[U]nder the current peremptory challenge procedure, the challenge must be duly presented with the necessary affidavit. If so, it is effective 'without any further act or proof.' … 'Where a disqualification motion is timely filed and in proper form, the trial court is bound to accept it without further inquiry.'" *Davcon, Inc. v. Roberts & Morgan*, 110 Cal. App. 4th 1355, 1360-61 (2003) ("the disqualification request 'takes effect instantaneously and irrevocably.'") (citations omitted). "Accordingly, the rule has developed that, once an affidavit of prejudice has been filed under section 170.6, the court has no jurisdiction to hold further proceedings in the matter except to inquire into the timeliness of the affidavit or its technical sufficiency under the statute." *McCartney v. Comm'n on Judicial Qualifications*, 12 Cal. 3d 512, 531-32 (1974). "When the affidavit is timely and properly made, immediate disqualification is mandatory." *Id.*

Parties have no right to attempt to delay the Court from acting on a peremptory challenge under section 170.6 by filing a spurious "opposition." Indeed, the party making the motion need not provide notice to the other parties until five days ***after*** making the motion, by which time, the Court should have acted on the motion. Code Civ Proc § 170.6(3). Rather, the Court is required to immediately determine for itself the timeliness and technical sufficiency of the peremptory challenge, and if so, the Court is bound to accept it without further inquiry. *McCartney*, 12 Cal. 3d at 531-32. Indeed, the Court has no jurisdiction to do anything else. *Id.* The Court should therefore strike and disregard LAPPL's improper "opposition" and immediately accept and act on Media Intervenors' peremptory challenge.

II. LAPPL'S "OPPOSITION" MISREPRESENTS THE LAW AND IS WHOLLY WITHOUT MERIT

Media Intervenors' peremptory challenge is timely because it was filed more than five days before the scheduled hearing on February 5, 2019, and within fifteen days of appearing in this action. *See* Media Intervenors' Memo in Support of Motion to Disqualify Judge at 2. LAPPL does not contend that Media Intervenors missed any deadline in submitting their peremptory challenge.

Rather, LAPPL argues that the Motion is improper because the Court "rule[d] on disputed issues of fact and law ***regarding the request to intervene***" and Media Intervenors "allowed Judge Chalfant to rule ***on the merits of the intervention motion***." (LAPPL Opposition at 5 (emphasis added).) These contentions are irrelevant.

First, LAPPL misstates the applicable law, relying on a case that was superseded by the 1965 amendment to section 170.6. LAPPL claims "that a 'challenge under section 170.6 is not timely after a judge has heard and ruled on contested issues of law or fact in an action or proceeding,'" citing *Swartzman v. Sup. Ct.*, 231 Cal.App.2d 197, 200 (1964). (LAPPL Opposition, p. 4.) But *Swartzman* is no longer good law:

> As the statute had been construed prior to the 1965 amendment, a challenge was not timely if it was made after the challenged judge had heard and ruled upon any contested issues of law or fact. (*Swartzman v. Superior Court* (1964) 231 Cal.App.2d 195, 200 [41 Cal.Rptr. 721].) ***The 1965 amendment made it clear, however, that an otherwise timely motion to disqualify the trial judge could also be properly made after any hearing or proceeding held prior to trial so long as the determination of a contested fact issue did not relate to the merit***s.

Brown v. Swickard, 163 Cal. App. 3d 820, 825 (1985) (emphasis added). "Here, ***it is crystal clear that the 1965 amendment changed the law*** and that a motion to disqualify a judge can now be made after any hearing or proceeding held prior to trial which does not involve a determination of a contested fact issue relating to the merits" of the case. *Kohn v. Superior Court of S.F.*, 239 Cal. App. 2d 428, 429-30, 431 (1966) (emphasis added) (pointing out that *Swartzman* was superseded by the 1965 amendments and holding that "a motion to disqualify the trial judge made pursuant to Code of Civil Procedure section 170.6 after his determination of probable cause under Penal Code section 995 is made ***before a determination of the factual issues relating to the merits of the case*** and is, therefore, timely." (emphasis original).)

Accordingly, since 1965 the law has been that "[h]owever important an issue may be to the outcome of a case, it is not a bar to a disqualification motion ***unless it requires resolution of 'contested fact issues relating to the merits' of the case***." *Sch. Dist. of Okaloosa County v. Superior Court*, 58 Cal. App. 4th 1126, 1133 (1997) (emphasis added) (holding decision on motion to quash service for lack of personal jurisdiction did not bar a section 170.6 peremptory challenge because did not determine contested facts relating to the merits of the case). *See also Johnny W. v. Superior Court*, 9 Cal.App.5th 559, 565 (2017) ("'It is not enough that a judge make a determination which relates to contested fact issues. [The judge] must have actually resolved or determined conflicting factual contentions relating to the merits prior to trial before the right to disqualify is lost.'") Accordingly, "a wide variety of orders have been held not to constitute determinations of contested facts related to the merits of the case under section 170.6. [] Examples are:

> (1) demurrers (*Fight for the Rams v. Superior Court* (1996) 41 Cal.App.4th 953, 957 [48 Cal. Rptr. 2d 851]; *Zdonek v. Superior Court* (1974) 38 Cal. App. 3d 849, 852 [113 Cal. Rptr. 669]); (2) judgment on the pleadings (*Hospital Council of Northern Cal. v. Superior Court* (1973) 30 Cal. App. 3d 331, 337 [106 Cal. Rptr. 247]); (3) summary judgment (*Bambula v. Superior Court* (1985) 174 Cal. App. 3d 653, 657 [220 Cal. Rptr. 223]); (4) ex parte order on a temporary restraining order (*Landmark Holding Group, Inc. v. Superior Court* (1987) 193 Cal. App. 3d 525, 528 [238 Cal. Rptr. 475]); (5) motions for a continuance (*Los Angeles County Dept. of Pub. Social Services v. Superior Court* (1977) 69 Cal. App. 3d 407, 417 [138 Cal. Rptr. 43]); (6) motions to amend an information (*People v. Hunter* (1977) 71 Cal. App. 3d 634, 638 [139 Cal. Rptr. 560]); (7) motions to quash on the ground of lack of personal jurisdiction (*School Dist. of Okaloosa County v. Superior Court* (1997) 58 Cal.App.4th 1126, 1133–1134 [68 Cal. Rptr. 2d 612] [holding motion did not bar peremptory challenge even though it involved disputed fact issues because the issues were not related to the merits of the case]); (8) protective orders (*Fight for the Rams, supra*, at p. 958); and (9) determinations under Penal Code section 995 analyzing the sufficiency of

> probable cause to hold a criminal defendant for trial (*Barrett v. Superior Court* (1999) 77 Cal.App.4th 1, 5–6 [91 Cal. Rptr. 2d 116]; *Kohn v. Superior Court* (1966) 239 Cal. App. 2d 428, 431 [48 Cal. Rptr. 832]).”

Guardado v. Superior Court, 163 Cal.App.4th 91, 97 and fn. 5 (2008) (holding that a decision on motion seeking pretrial punitive damages discovery under Civ.C. § 3295(c) was not directly related to merits of the action and so did not bar section 170.6 motion); *Swift*, 172 Cal.App.4th at 883 (same re motions to compel discovery); *Johnny W.*, 9 Cal.App.5th at 565 (same re initial detention hearing).

In deciding whether a particular motion is one requiring a determination of contested facts related to the merits of the case, courts look to the type of motion “in general terms,” not to the particulars of the case before the court. *Sch. Dist.*, 58 Cal. App. 4th at 1134 n.4. Thus, the question is whether motions to intervene in general require determination of contested facts relating to the merits of the case. *Id*. They do not. *See, e.g.*, Code Civ. Proc. § 387(d)(1) (listing the requirements for mandatory intervention); *Lindelli v. Town of San Anselmo*, 139 Cal.App.4th 1499, 1504 (2006) (listing the criteria for permissive intervention); *Hospital Council of Northern Cal. v. Superior Court*, 30 Cal.App.3d 331, 336-39 (1973). Rather, they involve solely the question of who may be a party to an action, and in no way involve the merits of the action.

Furthermore, an intervenor has the right to disqualify the judge after intervening—*i.e.*, after the motion to intervene is heard and decided. *Hospital Council of Northern Cal.*, 30 Cal.App.3d at 336, 339 (intervenors had right to make section 170.6 challenge which was not untimely even though judge had previously determined motions for judgment on the pleadings but was untimely because it was not made 5 days before the trial date); Cal. Judges Benchbook Civ. Proc. Before Trial § 10.78 (“On becoming a party, an intervener has the same rights as any other party to the action to demand a jury trial, to object to the court’s jurisdiction or to the sufficiency of the pleadings, or to disqualify a judge.”); *Deutschmann v. Sears, Roebuck & Co.*, 132 Cal.App.3d 912, 916 (1982) (“an intervener may move to disqualify a judge, even if the plaintiff is content to try the lawsuit in that court” citing *Hospital Council of Northern Cal.*, 30 Cal.App.3d at 339); *Bright v. Am. Termite Control Co.*, 220 Cal.App.3d 1464, 1470 (1990) (“the intervener has the same rights as any other party to demand a jury trial, to object to the court's jurisdiction or to the sufficiency of the pleading, or to disqualify a judge.”)

This Court did not determine any ***contested fact issues relating to the merits of the case*** in permitting Media Intervenors to intervene. As LAPPL acknowledges, the merits of this case concern whether Penal Code sections 832.7 and 832.8 (as amended by SB 1421) require disclosure of certain records pursuant to the California Public Records Act "regardless of when those records were created and regardless of when the underlying incidents occurred." (LAPPL Opposition at 2.) The Court has not determined any contested fact issues related to that question, and LAPPL points to no such contested fact issues.

III. CONCLUSION

The Court has not determined any contested fact issues relating to the merits of the case. Media Intervenors' CCP 170.6 peremptory challenge was timely and technically sufficient. The Court is without jurisdiction to do anything but immediately accept and act on Media Intervenors' peremptory challenge.

Dated: January 28, 2019

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By _____

TENAYA RODEWALD
JAMES CHADWICK
CRISTINA SALVATO
Attorneys for FIRST AMENDMENT COALITION, LOS ANGELES TIMES COMMUNICATIONS LLC, CALIFORNIA NEWSPAPERS PARTNERSHIP L.P., THE CENTER FOR INVESTIGATIVE REPORTING, and CALIFORNIA NEWS PUBLISHERS ASSOCIATION

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SANTA CLARA

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Santa Clara, State of California. My business address is 379 Lytton Avenue, Palo Alto, CA 94301-1479.

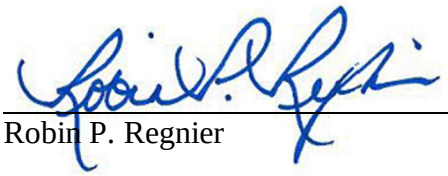
On January 28, 2019, I served true copies of the following document(s) described as **MEDIA INTERVENORS' EXCEPTION TO PETITIONER'S OPPOSITION TO MEDIA INTERVENORS' CCP 170.6 PEREMPTORY CHALLENGE, OR IN THE ALTERNATIVE, REPLY TO PETITIONER'S OPPOSITION** on the interested parties in this action as follows:

Richard A. Levine Rains Lucia Stern St. Phalle & Silver, PC rlevine@rlslawyers.com	*Attorneys for Petitioner Los Angeles Police Protective League*
Soraya Kelly Julie Raffish City of Los Angeles soraya.kelly@lacity.org julie.raffish@lacity.org	*Attorneys for Respondents City of Los Angeles; Michel R. Moore*
Peter Bibring Melanie P. Ochoa Rekha Arulanantham pbibring@aclusocal.org mpochoa@aclusocal.org rarulanantham@aclusocal.org	*Attorneys for Intervenors ACLU of Southern California and Valerie Rivera*

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent from e-mail address rregnier@sheppardmullin.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 28, 2019, at Palo Alto, California.



Robin P. Regnier